

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>Nextel Operating Corp. and NPCR, Inc.</b>	)	
<b>d/b/a Nextel Partners</b>	)	
	)	<b>ICC Docket No. 03-0487</b>
<b>Application for Certificates</b>	)	
<b>of Service Authority To Operate</b>	)	
<b>As Providers of CMRS Telecommunications</b>	)	
<b>Services in the State of Illinois</b>	)	
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**STAFF OF THE ILLINOIS COMMERCE COMMISSION  
REPLY TO BRIEFS ON EXCEPTION**

NOW COMES the Staff of the Illinois Commerce Commission (hereinafter "Staff"), by and through its undersigned attorneys, and pursuant to Section 200.830 of the Illinois Administrative Code (Ill. Adm. Code tit. 83 §200.830), and for its reply to Nextel Partners Operating Corp. and NPCR, Inc. d/b/a Nextel Partners' Brief on Exceptions, states the following:

**Summary**

Although Nextel Partners Operating Corporation ("NPOC") and NPCR, Inc. ("NPCR") (jointly referred to as "Applicants") raise several exceptions to the Proposed Order issued February 18, 2004, in their Brief on Exceptions, each of their arguments is based on the faulty premise that Section 13-401 allows an applicant that does **not** possess the FCC license to receive a certificate without a hearing under Section 13-401. The Applicants have two primary arguments. Their first argument is that Section 13-401, and the Proposed Order's dismissal of their application, are regulations of entry in violation of Section 332(c) of the Telecommunications Act of 1934. Their second

argument is that the dismissal is contrary to Commission's finding in Docket No. 00-414 ("VoiceStream Order"). Both arguments lack merit.

The plain language of Section 13-401 requires the applicant to show that it possesses a construction permit or license from the FCC to operate. 220 ILCS 5/13-401(a). In the instant case, the Applicants do not possess FCC licenses to operate, but admit that those licenses are held by other related entities. See Amended Application of NPOC and NPCR at ¶¶ 4, 12-13. The Applicants argue that Section 13-401 should be interpreted such that any company who is operating as a cellular mobile radio service ("CMRS") provider should obtain a certificate, even if that provider does not possess the FCC issued licenses, if it is operating under licenses held by an affiliate. Applicants BOE at 13-15. Section 13-401 cannot be read as broadly as the Applicants contend. Section 13-401 does not allow any carrier providing cellular service to receive a certificate without a hearing, nor does it grant a certificate to an applicant operating under licenses held by an affiliate. The plain language of Section 13-401 requires the applicant show that it has a license or permit from the FCC. 220 ILCS 5/13-401.

The Proposed Order's interpretation of the statute is in harmony with existing FCC rules. Section 332(c) of the Telecommunications Act does reserve for the FCC the ability to determine what carriers can provide CMRS service; however, in this instance, the Commission is not denying a certificate to those Applicants who have been licensed by the FCC to provide CMRS service. With the clarification provided by Staff's proposed exceptions license, the dismissal is not with prejudice. Staff has presented to the Applicants alternatives that Staff believes would be consistent with and meet the certification requirements set forth in the Public Utilities Act. See Staff Motion to Dismiss,

¶16. As an alternative, Staff recommended that the Applicants amend their application and include the license-holders. See Staff Motion to Dismiss at 21.

Neither the dismissal, nor the Proposed Order's interpretation of the statute, are barriers to entry in violation of Section 332(c), since the Proposed Order in no way indicates that Applicants are prohibited from applying for a certificate under other sections of the PUA or amending their application to state a proper request for a certificate under Section 13-401 (e.g., by seeking certification in the name of the FCC license-holders or by including the license-holders in a joint certification request). Ironically, while the Applicants rely upon FCC licensing of CMRS providers to challenge the Proposed Order, the Proposed Order does little more than dismiss the Applicants' petition for failure to include the *actual* FCC license-holders as part of the application for a certificate. Applicants know full well that they are not being prohibited from entering the CMRS market. Instead, they are only being told that the FCC license holders must be a party to an Illinois certificate sought under Section 13-401. The fact that Applicants do not like this registration requirement does not in any way transform the Proposed Order into a barrier to entry. Furthermore, this order does not prohibit Applicant's from continuing to operate in Illinois, as they imply in paragraph 3 of their brief. Applicants have been operating in Illinois since at least 2000, and they continue to operate (see docket no. 04-0061, in which NPCR seeks an amendment of an existing interconnection agreement with SBC). Applicants reliance on the *VoiceStream Order* is also faulty. The *VoiceStream Order* is inapplicable to the instant matter because the corporate structure was not a contested matter in that case, as it is in this case, and the order was internally inconsistent in terms of the recitation of the corporate structure of VoiceStream and its subsidiaries. Staff Reply to Motion to Dismiss

at ¶¶5, 6. Thus Staff recommends that the Applicants exceptions to the Proposed Order be rejected.

# **1. Dismissing the Application is not a Barrier to Entry**

Applicants argue that the Proposed Order seeks to prohibit the operation of a wireless carrier and is in violation of federal law. Applicants BOE at ¶¶4-11. The Applicants cite Section 332(c)(3)(A) of the Communications Act as preempting states ability to regulate entry of wireless telecommunications carriers. Id. at ¶5. The interpretation and application of Section 13-401 set forth in the Proposed Order does not present a barrier to entry. For this Proposed Order to be a barrier to entry it would have to stop them from entering in to the marketplace and operating. See In the Matter of Petition of Arizona Corporation Commission, FCC 95-190 at ¶69<sup>1</sup>. The Proposed Order does not go this far. NPCR has been operating in Illinois for approximately four years and the Proposed Order does not require them to stop operating. The Proposed Order denies the Applicants -- NPOC and NPCR -- from having a certificate since they do not possess the FCC licenses to operate. In effect, it recognizes the FCC's ability to regulate entry through its licensing regulations, and it simply requires the applicant to register the FCC license-holders with the Commission.

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<sup>1</sup> In the Matter of Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services And In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, PR Docket No. 94-104; GN Docket No. 93-252, FCC 95-190, ¶ 69, rel.: May 19, 1995 (in which Arizona Corporate Commission sought authority to regulate entry and operation).

## **2. The *VoiceStream Order* is not Applicable to Applicant's**

Applicants argue that the Commission, in the *VoiceStream Order*, granted VoiceStream PCS II a certificate when it operated under FCC licenses held by a wholly-owned non-operating affiliate of an applicant, which is similar to this application. Applicants BOE at ¶11. Therefore, the Applicants argue that denying their application is contrary to ICC precedent. Applicants BOE at ¶4. The *VoiceStream* case is distinguishable from the instant matter.

Although the *VoiceStream Order* (Docket No. 00-0414) cited by Applicants may have involved a factual situation where the applicant did not directly hold the FCC license, Applicants reliance on that order is misplaced. As explained in paragraph's 5 and 6 of *Staff's Reply to Applicants' Response to Staff's Motion to Dismiss*, the FCC licensing requirement was not at issue in the *VoiceStream Order* and no ruling was made considering this issue on the merits. Indeed, neither Staff nor any other party actively participated in the *VoiceStream* case. Although Staff believes the *VoiceStream Order* involved a case where the facts indicated that the FCC licenses were held by applicant's subsidiaries, the order also includes inconsistent statements indicating that the applicant held the FCC licenses. As discussed in Staff's Motion to Dismiss, the *VoiceStream Order* also involved a parent subsidiary relationship, whereas in this case, the license-holders are subsidiaries of Nextel Partners, not the operating companies. In the *VoiceStream* application the operating company was operating under FCC licenses held by its direct subsidiaries. VoiceStream Order, Docket 00-0414 at 1.

The instant case is distinguishable from the *VoiceStream* case for a number of reasons, one of which being that NPCR is operating under licenses held by an affiliate

and not a subsidiary. See Staff's Reply to NPOC's and NPCR's Response to Staff's Motion to Dismiss at ¶¶5-6 (discussing other reasons why the VoiceStream case is distinguishable from the instant case). Nextel Partners is the parent company of NPOC, Nextel WIP and Nextel Expansion. See Staff's Motion to Dismiss at ¶8; see also Applicants Amended Application at ¶¶4, 12-13 (describing the fact that Nextel WIP and Nextel Expansion are subsidiaries of Nextel Partners, and not subsidiaries of NPOC, as was alleged in the initial application). NPCR, which is the operating company, is a subsidiary of NPOC, and not the parent of Nextel WIP and Nextel Expansion. For this case to be analogous to the VoiceStream case the licenses need to be attributable to the operating company, NPCR. In the VoiceStream case it appears, although not directly discussed within the order, that the Commission attributed the subsidiaries licenses to the parent company, whereas such an attribution can not be made in the instant case since NPCR is not the parent company of the license-holders. For the VoiceStream case to be applicable, NPCR would need to be the parent of the license-holders. When this fact, and all the factors discussed in Staff's Motion to dismiss and Reply to the Motion to Dismiss are taken into consideration, it is clear that the *VoiceStream Order* provides no obstacle to following the statutory requirement of Section 13-401 that an applicant show the FCC has issued a license to it.

**3. Staff Has No Knowledge Whether Applicants' Operations are in Compliance with FCC Rules and Regulations**

In paragraph 2, 8 and 14, Applicants takes Staff's position out of context, construing Staff's statement as a finding that they are operating in compliance with FCC rules and regulations. See Applicants BOE at ¶¶2, 8, 14. Staff's statement

acknowledged that it has no first hand knowledge of Applicants' operations violating FCC rules and regulations, which is a marked difference from an endorsement of operations actually being in compliance.

WHEREFORE the reasons stated herein and in its brief on exceptions, the Staff of the Illinois Commerce Commission respectfully recommends that the Proposed Order be adopted with the exceptions set forth in Staff's brief on exceptions.

Dated: March 10, 2004

Respectfully Submitted,

/s/  
By its Attorneys,

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